

All Points Capital Corp. v Lexi Towing Corp.

2007 NY Slip Op 31943(U)

June 29, 2007

Supreme Court, Richmond County

Docket Number: 0101809/2006

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF RICHMOND

PART DCM 3

Index No.: 101809/2006

Motion Nos.: 3210 - 002

3489 -

003

ALL POINTS CAPITAL CORP.,
 004

3653 -

Plaintiff

DECISION & ORDER
HON. JOSEPH J. MALTESE

against

LEXI TOWING CORP., d/b/a COUNTY RECOVERY
TATYANA GILEVICH and GRIGORY GILEVICH,

Defendants

The following items were considered in the review of this motion to renew prior order to cancel lien & impose temporary restraining order and for summary judgment

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed (dated October 23, 2006)	1
Order to Show Cause and Affidavits Annexed (dated July 28 th , 2006)	2
Answering Affidavit to Order to Show Cause	3
Reply Papers to Order to Show Cause	4
Notice of Motion and Affidavits Annexed (dated August 31, 2006)	5
Answering Affidavits to the Notice of Motion (dated October 23, 2006)	6,7
Replying Papers to Order to Show Cause (dated November 16, 2006)	8
Answering Affidavits to the Notice of Motion (dated December 13, 2006)	9
Notice of Cross Motion and Affidavits Annexed (dated December 1, 2006)	10

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Plaintiff ALL POINTS CAPITAL CORP. (as predecessor to an agreement between Commercial Resources Corp. and LEXI TOWING CORP.) initially petitioned this Court by Order to Show Cause for the seizure of a vehicle that is the subject of a security interest in a mortgage agreement between plaintiff ALL POINTS CAPITAL CORP. (hereinafter APCC) and defendant LEXI TOWING CORP. (hereinafter LEXI). By Order to Show Cause, plaintiff sought to cancel the towing lien held by STATEN ISLAND TOWING SERVICES, INC., and to impose a temporary restraining order preventing STATEN ISLAND TOWING SERVICE, INC. from selling or otherwise disposing the subject vehicle in its possession.

Pending the disposition of plaintiff's petition, plaintiff commenced an action to recover, *inter alia*, the unpaid balance allegedly due on a chattel mortgage agreement executed by Commercial Resources Corp. (plaintiff's predecessor) and LEXI on May 25, 2004. Plaintiff has alleged that LEXI executed the agreement in order to borrow funds from Commercial Resources Corp. to purchase vehicles. It is further alleged that the chattel agreement provided that certain vehicles will stand as collateral under the agreement. The agreement further provided that in the event of LEXI's default of any of its obligations, plaintiff may declare the entire balance of the loan due and payable; terminate the agreement and re-possess the chattel mortgage vehicles held as security. Plaintiff also contends that TATYANA GILEVICH and GRIGORY GILEVICH executed personal guarantees in the event of LEXI's default under the chattel mortgage agreement. According to the mortgage agreement and other supporting papers, TATYANA GILEVICH executed all documents as the president of LEXI.

According to plaintiff, LEXI failed to make any payments after December 2005. Plaintiff claimed that the loan is in default and accelerated the amount due under the mortgage. In March 2006, LEXI asked to pre-pay a portion of the mortgage attributable to one of the vehicles for which plaintiff has a security interest. Plaintiff accepted \$52,000 in exchange for the release of plaintiff's lien on the vehicle. According to plaintiff, a balance of \$38,819.67 remained outstanding plus interest and penalties provided for in the mortgage agreement. As a result of LEXI's failure to pay the remaining balance, plaintiff commenced the within action.

Plaintiff also moved for summary judgment against defendant LEXI TOWING CORP. on its first, second and third causes of action based upon LEXI's default on the chattel mortgage agreement; for a judgment against defendant TATYANA GILEVICH on the fifth cause of action based upon her personal guarantee. Plaintiff further moves to sever the fourth and sixth causes

of action as against GRIGORY GILEVICH due to the petitioner's Order to Show Cause for the seizure of vehicles named as the security interest in the agreement, and also due to the fact the MR. GILEVICH is deceased and no administrator has been appointed on behalf of his estate. According to plaintiff, TATYANA GILEVICH's answer raised an affirmative defense that references the fact that no administrator has been appointed for GRIGORY GILEVICH's estate.

In a prior Decision and Order of this Court dated October 10, 2006, plaintiff's order to show cause and motion were denied with leave to renew upon the appointment of an administrator to represent the interests of MR. GILOVICH. The Court noted that MR. GILOVICH's death stays proceedings until an administrator is appointed.

Plaintiff now moves for leave to renew and reargue this prior decision and claims that the Court overlooked or misapprehended certain factors, or misapplied controlling principles of law. According to plaintiff, MR. GILOVICH had predeceased the commencement of this action, and was never a party to the action given the fact that neither he nor his estate were ever served with a summons and complaint.

It is well settled that a motion for leave to renew must be supported by new or additional facts which, although in existence at the time of a prior motion, were not known to the party seeking renewal, and, consequently, not made known to the court (*see* CPLR 2221[e]; Brooklyn Welding Corp. v. Chin, 236 AD2d 392 [2nd Dept 1997] *citing* Foley v. Roche, 68 AD2d 558, 568). Leave to reargue shall be granted where the court overlooked or misapprehended the law or the facts in its prior determination (*see* CPLR 2221[d]). This Court is now so informed.

Accordingly, plaintiff's application for leave to renew is granted. In view of the passing of GRIGORY GILEVICH *prior* to the commencement of this action, the appropriate remedy at this juncture would be to amend the caption to delete MR. GILEVICH's name, and the action should proceed against the remaining parties. It is well settled that a party cannot bring a legal action or proceeding against a dead person without naming the estate through a personal representative nor can a party enter a personal judgment against a decedent (*see* Park Ten Assos. v. Rudell, NYLJ, Dec. 11, 1981; p.6, col.8; CPLR 1015[a]). Here, it is uncontested that no attempts were ever made to serve anyone on behalf of MR. GILOVICH's estate. In the absence of the service, neither he nor his estate was ever served to make him a party to the action.

Finally, in the exercise of appropriate discretion by this Court, the automatic stay issued is hereby vacated. The underlying reason for the stay was to allow for the appointment of a representative on behalf of MR. GILOVICH's estate. Under the present circumstances, however, the grounds for the stay are no longer relevant particularly in view of the fact that MR. GILOVICH was never served and therefore is not a party to the action. Moreover, a careful reading of the papers submitted on the renewal/reargue motion indicate that defendant TATYANA GILOVICH is the signatory on all of the papers relevant to the agreement between the parties.

The Court, nevertheless, denies plaintiff's application to either invalidate or cancel the lien claimed by STATEN ISLAND TOWING SERVICE, INC., or for seizure of the vehicle which is claimed to be the security interest of plaintiff in a separate agreement with LEXI TOWING CORP. Highly contested issues are presented by both parties surrounding the validity

of the lien, and the amount claimed thereunder which prevent the Court entering judgment in favor of either party.

In addition, plaintiff's request for a temporary restraining order preventing STATEN ISLAND TOWING SERVICE INC. from transferring, selling, assigning or otherwise disposing of the subject vehicle, is denied. Ordinarily, a temporary restraining order would be granted enjoining a party from disposing of, *e.g.* a chattel, when it has been established that the chattel is unique (*see* CPLR 7109[a]; Prozeralik v. Johnston, 182 AD2d 1108), or where a party in possession of the chattel, would be financially unable to pay any judgment that might be entered against him (*see* Sutton, DeLeeuw, Clark & Darcy v. Beck, 155 AD2d 962, 963). Here, plaintiff has failed to submit any proof establishing that the chattel is unique or the necessity for a temporary restraining order. Nonetheless, it should be noted that any party who sells or disposes of the subject vehicle(s) has an obligation to account for the proceeds of such sale.

With regard to the motion and cross motion for summary judgment, it is the opinion of this Court that the motions are premature in view of the fact that discovery is only in its initial stages. (*see* CPLR3212[f]; Ramos v. Degi Deutsche Desellschaft Fuer Immobilienfonds MBH, 37 AD3d 82). Moreover, while plaintiff has submitted copies of the mortgage agreement and the personal guarantee purportedly executed by defendant MRS. TATYANA GILEVICH, raised issues of fact regarding the authenticity of her signature on the submitted documents. Whether MR. GRIGORY GILEVICH signed his wife's name as her or with her assent, are issues to be determined. For the same reasons, cross motion of LEXI as against MRS. TATYANA GILEVICH, is also denied at this juncture.

Accordingly, it is hereby:

ORDERED that the plaintiff's motion for renewal is granted; and upon such renewal, it is further

ORDERED that the Order to Show Cause is denied; and it is further

ORDERED that the plaintiff's motion for summary judgment is denied with leave to renewal upon the completion of discovery; and it is further

ORDERED that the cross motion of defendant LEXI TOWING CORP. is denied with leave to renewal upon the completion of discovery.

All parties shall appear for a status conference in DCM Part 3 at 9:30 a.m. on **July 30, 2007.**

ENTER,

DATED: June 29, 2007

Joseph J. Maltese
Justice of the Supreme Court